SEP 3 2002

No. 02-12

In The

Supreme Court of the United States

CHRISTOPHER LANGDON,

Petitioner,

v.

J.J. SWAIN, F.D. MARTIN, JACK MURDOCK, LYNDO TIPPETT, NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, ROY COOPER, NORTH CAROLINA DEPARTMENT OF JUSTICE, AND STATE OF NORTH CAROLINA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Plaintiff presents eleven questions for review in his Petition (Pet. pp. i - iii), but presents only six distinct issues for argument which consolidate several of the questions presented. Defendants thus propose six questions presented that correspond to Plaintiff's argument.

I. **Whether Plaintiff's Complaints were properly dismissed as frivolous and malicious?**

II. **Whether Plaintiff's takings claim was properly brought against employees sued in their individual capacity?**

III. **Whether Plaintiff's "papers" were not liberally construed?**

IV. **Whether the District Court abused its discretion by denying Plaintiff's Motion for Default Entry and granting Defendants' Amended Motions for Extensions of Time?**

V. **Whether the doctrine of *res judicata* was properly applied herein?**

VI. **Whether the District Court abused its discretion by denying Plaintiff's motion to recuse?**

LISTING OF PARTIES

Petitioner failed to list all Respondents in his Petition. The Respondents are J.J. Swain; F.D. Martin; Jack Murdock; Lyndo Tippett, Secretary of the North Carolina Department of Transportation; the North Carolina Department of Transportation; Roy Cooper, North Carolina Attorney General; the North Carolina Department of Justice; and the State of North Carolina. As stated by Petitioner, Dave Henderson is not a party to this case, as he was never served with a Complaint.

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CITATIONS OF LOWER COURT OPINIONS

None of the opinions and orders entered by the lower courts were published. The opinions and orders at issue are: (1) *Langdon v. Swain*, No. 1:01CV139 (W.D.N.C. July 27, 2001) (order granting Defendants' amended motions for extension of time to answer and denying Plaintiff's motion for default entry); (2) *Langdon v. Tippett*, No. 1:01CV107, and *Langdon v. Swain*, No. 1:01CV139 (W.D.N.C. Aug. 6, 2001) (order consolidating and dismissing cases, and separate order denying Plaintiff's motions for change of venue and to recuse); (3) *Langdon v. Swain*, Nos. 01-1975 and 01-2019 (4th Cir. Mar. 12, 2002).[1]

JURISDICTION OF THIS COURT

The opinion of the Fourth Circuit Court of Appeals was entered on February 20, 2002, and refiled March 12, 2002 to correct a technical error. Petitioner filed a timely petition for rehearing and rehearing en banc, which was denied April 11, 2002. This Court may review on a writ of certiorari the judgment at issue pursuant to 28 U.S.C. § 1254(1).

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[1]This opinion may also be found at *Langdon v. Swain*, 2002 U.S. App. LEXIS 2680 (4th Cir. Feb. 20, 2002).

STATUTORY PROVISIONS INVOLVED

The principal statutory provisions involved in this case are 42 U.S.C. § 1983, 28 U.S.C. § 1915, and 28 U.S.C. § 455.

STATEMENT OF THE CASE

Plaintiff filed case 1:01CV107 against Defendants Lyndo Tippett, North Carolina Department of Transportation (NCDOT), Roy Cooper, North Carolina Department of Justice, and the State of North Carolina in United States District Court, Western District of North Carolina, on May 21, 2001, alleging that numerous statutes of the state of North Carolina relating to condemnation of land and/or statutes of limitation are unconstitutional. Plaintiff's basis for jurisdiction in federal court appears to have been the existence of a federal question.[2] 28 U.S.C. § 1331. Defendants timely filed Answer July 26, 2001, asserting, *inter alia*, the doctrine of *res judicata* as a defense.

Plaintiff filed case 1:01CV139 against three current or former NCDOT employees, J.J. Swain, Jack Murdock, and F.D. Martin, in United States District Court, Western Dis-

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[2]Plaintiff asserts in his Petition that this suit was brought pursuant to 42 U.S.C. § 1983, and that 28 U.S.C. § 1343 was one basis for jurisdiction. (Pet. p. 2) However, neither statute was mentioned in Plaintiff's Complaint.

trict of North Carolina, on June 18, 2001. Plaintiff sued the Defendants in their individual capacities, ostensibly for a taking of his property through inverse condemnation, and sought $117,179.00 in compensatory damages for the taking of his real property and his business; $200,000.00 in "compensatory" damages for the deprivation of his constitutional rights and pain and suffering; $50,000.00 in legal expenses; and $300,000.00 in punitive damages. Plaintiff's basis for jurisdiction in federal court appears to have been the existence of a federal question and diversity of citizenship. 28 U.S.C. § 1331, 1332.

Defendants Swain and Martin were served with the Complaint on June 29, 2001, while Defendant Murdock was served on June 28, 2001. On July 19, 2001, Defendants jointly served a "Motion for Extension of Time to Answer." Defendants Swain and Martin (together) and Defendant Murdock (alone) served separate documents entitled "Amended Motion for Extension of Time to Answer" on July 20, 2001, after Defendants' counsel realized that the initial Motion for Extension of Time was served one day after time to serve such pleading had expired as to Defendant Murdock. Defendant Murdock's amended motion acknowledged that time had expired, but stated that Defendant Murdock would be "greatly prejudiced by a default judgment." (Pet. App. p. 102)

Plaintiff served a "Motion for Default Entry by the Clerk of Court" on July 19, 2001. Defendants' Motion for

Extension of Time and Amended Motions for Extension of Time, and Plaintiff's Motion for Default Entry, were all filed in the Clerk's Office on July 23, 2001. On July 27, 2001, Magistrate Judge Max O. Cogburn granted Defendants' Amended Motions for Extension of Time and denied as moot Plaintiff's Motion for Default Entry. Defendants were granted up to and including August 17, 2001, to answer Plaintiff's Complaint. Plaintiff timely appealed this Order, which appeal was assigned case number 01-1975 by the Fourth Circuit Court of Appeals.

On August 6, 2001, prior to the time in which Defendants were required to file answer in case 1:01CV139, District Judge Lacy H. Thornburg entered Orders consolidating cases 1:01CV107 and 1:01CV139, dismissing both cases *sua sponte*, and denying Plaintiff's motions for change of venue and to recuse. Plaintiff timely appealed these Orders, which appeal was assigned case number 01-2019 by the Fourth Circuit Court of Appeals.

The Fourth Circuit consolidated the two appeals. Plaintiff presented three issues for appeal: (1) whether the July 27, 2001 order granting Defendants' Amended Motion for Extension of Time was proper; (2) whether Judge Thornburg should have recused himself from these cases; and (3) whether the August 6, 2001 order dismissing Plaintiff's Complaints *sua sponte* was proper. The Court of Appeals entered an opinion affirming each or-

der of the lower court on February 20, 2002, which opinion was amended to correct a technical error on March 12, 2002. The Court of Appeals also denied several motions filed by Plaintiff in that court: a Motion to Strike the Appellee's informal brief; four Motions for Sanctions;[3] and a Motion for Default Judgment.

ARGUMENT

Before proceeding, Respondents feel obliged to note that Petitioner has failed to "amplify[] the reasons relied on for allowance of the writ," as required by Rule 14(1)(h) of the Rules of this Court. Petitioner has not argued in his Petition that any of the reasons for granting a petition for writ of certiorari, contained in Rule 10 of the Rules of this Court, apply herein. Instead, Petitioner treats his Petition as if it were his Brief on the Merits for Petitioner. Respondents will address the contentions in the Petition,

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[3]Thus, contrary to Plaintiff's assertion, these motions were not "ignored" by the Circuit Court. (Pet. p. 3) Plaintiff also makes reference in his Petition (pp. 16, 20) to Defendants' perceived failure to respond to his motions for sanctions. Pursuant to Fourth Circuit Local Rule 27(d), Defendants were not required to respond to these motions. Plaintiff's assertion that such failure to respond constitutes an admission of the allegations contained in his motions for sanctions is meritless. Finally, Defendants object to Plaintiff's placement of "edited" versions of his informal briefs and motions for sanctions in the Appendix. (Pet. App. pp. 114, 120, 129, 134, 141) Plaintiff should have included each document in its entirety, or excluded them altogether.

but will also address whether there are any "compelling reasons" for granting the petition in this case. Rule 10.

I. Plaintiff's Complaints were properly dismissed as frivolous and malicious

Plaintiff first argues it was improper for the district court to dismiss his Complaints pursuant to 28 U.S.C. § 1915(e)(2), because that statute only applies to Complaints filed by prisoners. Defendants do not dispute that Plaintiff was not a prisoner at the time his Complaints were filed, and that Plaintiff has not requested *in forma pauperis* status.

It appears the Fourth Circuit has never squarely addressed the issue of whether 28 U.S.C. § 1915(e)(2) applies to non-prisoner, non-*in forma pauperis* Complaints. Plaintiff is correct that other circuits have held that the statute only applies to *in forma pauperis* claims. *See Grayson v. Mayview State Hosp.*, 293 F.3d 103, n. 10 (3rd Cir. 2002); *Benson v. O'Brian*, 179 F.3d 1014, 1017 (6th Cir. 1999) (citing cases from 5th, 8th and 9th Circuits). If the Fourth Circuit's opinion herein conflicts with that of other Circuits, such conflict is immaterial as the opinion herein was an unpublished opinion with little precedential value.

Further, though both lower courts did mention 28 U.S.C. § 1915 in their orders herein, federal courts have the inherent power, independent of the application of that statute, to dismiss Complaints as frivolous or malicious. The federal courts have inherent powers to "fashion an appropriate sanction for conduct which abuses the judicial process," though they must exercise those powers "with restraint and discretion." *Chambers v. NASCO*, 501 U.S. 32, 44-45 (1991). "[T]here is little doubt" that the federal courts have the inherent power to dismiss a case as frivolous or malicious. *Mallard v. United States Dist. Court for Southern Dist.*, 490 U.S. 296, 307-08 (1989); *see also Fitzgerald v. First East Seventh St. Tenants Corp.*, 221 F.3d 362, 364 (2nd Cir. 2000) (affirming *sua sponte* dismissal of *pro se* plaintiff's frivolous complaint).

Both the District and Circuit Court herein found Plaintiff's Complaints to be frivolous and malicious, and dismissed the Complaints on those grounds, with a (perhaps erroneous) citation to 28 U.S.C. § 1915. However, Plaintiff fails to show any abuse of discretion in the courts' exercise of their inherent powers to dismiss his Complaints as frivolous or malicious, and has presented no compelling reason why his frivolous lawsuits should be the subject of review in this Court. *See* Rule 10.

II. There is no compelling reason for this Court to review a potentially erroneous alternative holding of the Fourth Circuit in an unpublished opinion

The Fourth Circuit noted in its opinion herein that *Langdon v. Swain* (1:01CV139), a case brought against three NCDOT employees in their individual capacities, was subject to dismissal for failure to state a claim upon which relief could be granted "because takings actions sound against governmental entities rather than individual state employees in their individual capacities."[4] (Pet. App. p. 18(a)) However, it appears the court may have overlooked Plaintiff's assertions that his claim was based on 42 U.S.C. § 1983, under which it is permissible to sue a state official in his individual capacity upon an allegation that the official, acting under color of law, deprived the plaintiff of a federal right, *see Hafer v. Melo*, 502 U.S. 21 (1991), though the defense of qualified immunity is available to the official, *see id.; see also Harbert Int'l v. James*, 157 F.3d 1271 (11th Cir. 1998) (qualified immunity may protect official from takings claim brought against official in his individual capacity).

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[4]Plaintiff misconstrues the Fourth Circuit's opinion. The court did not state that takings claims "are not allowed in federal court against state officials," (Pet. p. 6) but rather limited its opinion to the situation presented here: state employees sued in their individual capacity.

Even if Plaintiff may have stated a claim upon which relief could be granted, the Fourth Circuit and District Court both held that Plaintiff's claim against the individual employees was also barred by *res judicata* and was a frivolous claim subject to *sua sponte* dismissal, without a "hearing"as Plaintiff now requests. (Pet. p. 7) The court's power to dismiss Plaintiff's claim *sua sponte* as frivolous is discussed above in section I; the application of *res judicata* is discussed below in section V. As discussed therein, Plaintiff's Complaint was properly dismissed by the lower courts.

Plaintiff has failed to present a compelling reason why this Court should grant his Petition, based on a potentially erroneous alternative holding of the Fourth Circuit, presented in an unpublished opinion with little precedential value. *See* Rule 10.

III. Plaintiff has presented no evidence that his "papers" were not liberally construed

Plaintiff's third argument is centered around the maxim that the pleadings and papers of *pro se* litigants should be liberally construed. *See, e.g., Haines v. Kerner*, 404 U.S. 519, 520 (1972) (*pro se* complaint held to "less stringent standards than formal pleadings drafted by lawyers"). Plaintiff asserts this maxim was violated herein because (1) the lower courts "never stated that [his] papers had been liberally construed;" (2) no one provided

him with information about attorneys who provide services *pro bono*; (3) oral argument of *pro se* appeals is disfavored by the Fourth Circuit; and, (4) his motion to extend time to file a petition for rehearing in the Fourth Circuit was denied.

There is no requirement, constitutional or otherwise, that a lower court must state in its opinion that a *pro se* party's papers were "liberally construed;" that a *pro se* party be provided with a list of *pro bono* attorneys; that *pro se* parties are entitled to oral argument; or that *pro se* parties are entitled to more time to file petitions for rehearing than parties who retain an attorney. Plaintiff has presented no other evidence or argument showing that his "papers" were treated improperly by any of the lower courts, and has presented no compelling reason why this alleged impropriety provides the basis for a grant of his Petition for writ of certiorari. *See* Rule 10.

IV. The District Court did not abuse its discretion by denying Plaintiff's Motion for Default Entry and granting Defendants' Amended Motions for Extension of Time

Plaintiff next argues the District Court erred by granting Defendant's Amended Motions for Extension of Time filed in *Langdon v. Swain*, 1:01CV139. As discussed above, Defendants Swain, Martin, and Murdock jointly served a Motion for Extension of Time to Answer on July 19,

2001. However, Defendant Murdock's Motion for Extension of Time was served one day late.[5] Thus, on July 20, 2001, Defendants Swain and Martin (together) and Defendant Murdock (alone) served Amended Motions for Extension of Time, which recognized the mistake that had been made.

At approximately the same time, Plaintiff served a Motion for Default Entry and a Correction of Motion for Default Entry. Defendants' July 19 and 20 motions, and Plaintiff's motions for default entry, were all filed in the Clerk's office on July 23, 2001.

Plaintiff asserts that on these facts, default entry was mandatory. (Pet. pp. 10 - 11) However, given that all the motions arrived in the Clerk's office on the same day, Plaintiff cannot show that Defendants had "failed to plead or otherwise defend " before his motions for default entry were filed. Fed. R. Civ. P. 55(a). Default entry was thus not appropriate, and the district court did not abuse its discretion by denying Plaintiff's motion. *See Draper v. Coombs*, 792 F.2d 915, 924-25 (9th Cir. 1986) (district court did not abuse discretion by denying motion for

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[5]Plaintiff states on page 21 of his Petition that "the defendants in *Langdon v. Swain, Martin and Murdock* are in default," thus implying that all three Defendants filed untimely Motions for Extension of Time. (Pet. p. 21) This is simply not true, as the July 19, 2001 Motion for Extension of Time was timely filed as to Defendants Swain and Martin.

default entry that was filed on same day as late answer).

In his order granting Defendants' Amended Motions to Extend Time, the Magistrate Judge found that "defendants' error in seeking the proposed extensions was based upon a misunderstanding as to when defendants were served, and that defendants took prompt remedial action, [such that] the court attributes the error to excusable neglect and will grant the proposed extensions, which moots plaintiff's motions." (Pet. App. p. 2) Motions for extensions of time filed "after the expiration of the specified period" may be permitted "where the failure to act was the result of excusable neglect." Fed. R. Civ. Proc. 6(b)(2).

Excusable neglect "is a somewhat 'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of the movant," but may also "extend to inadvertent delays." *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 392 (1993) (footnotes omitted). Courts may thus accept "late filings caused by inadvertence, mistake or carelessness." *Id.* at 388. The late filing of the motion in the instant case was due to neglect: the failure to correctly calculate the deadline for filing. *See Sugarbaker v. SSM Health Care*, 187 F.3d 853, 856 (8th Cir. 1999) (filing of motion one day late due to miscalculation of deadline deemed result of "neglect"), *cert. denied*, 528 U.S. 1137, 120 S. Ct. 980, 145 L. Ed. 2d 931 (2000). However, the neglect must also be deemed

"excusable" before relief can be granted. *See id.; see also Pioneer*, 507 U.S. at 395.

The determination of whether neglect is excusable is an "equitable" determination, and the court should consider "the danger of prejudice to the [non-movant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay . . ., and whether the movant acted in good faith." *Pioneer*, 507 U.S. at 395.

Because the length of delay herein was only one day, and because timely Motions to Extend Time had been filed with respect to two of the three Defendants, there was no danger of prejudice to Plaintiff and no detrimental impact to the judicial proceedings. *See Sugarbaker*, 187 F.3d at 856. Further, the delay was due to a misunderstanding, and was promptly remedied by the Defendants, thus showing good faith.

Plaintiff's allegations of bad faith[6] on the part of the Defendants concern, for the most part, alleged conduct of the Defendants that has no relation to the untimely Motion for Extension of Time. (Pet. pp. 17 - 21) Plaintiff's more relevant allegations – regarding Defendant Mur-

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[6]Plaintiff also alludes to some undefined prejudice to him that resulted from the one day delay. (Pet. p. 21) However, as Plaintiff has not specified the alleged prejudice, Defendants have nothing concrete to respond to and will not address this facet of Plaintiff's argument.

dock's handling of his Complaint and Plaintiff's contact with Defendants' counsel (Pet. pp. 14, 16) - also do not show bad faith in Defendant Murdock's failure to timely file an extension. Those allegations merely show, as Defendants contend, that Defendants' counsel mistakenly filed the Motion for Extension of Time one day late as to Defendant Murdock, because of confusion over the date he was served and consequent miscalculation of the deadline for replying.

"A district court's ruling on excusable neglect is reviewed for abuse of discretion." *United States v. Borromeo*, 945 F.2d 750, 754 (4th Cir. 1991). The Fourth Circuit applied that standard below and found no abuse of discretion.

As the Fourth Circuit applied "a properly stated rule of law," and as Plaintiff presented no compelling reason for review of the treatment of the motions at issue, this Court should refrain from granting Plaintiff's Petition on this ground. *See* Rule 10.

V. Plaintiff's Complaints were properly dismissed as frivolous on the grounds of *res judicata* and/or failure to state a claim and qualified immunity

Plaintiff's fifth argument concerns the lower court's application of *res judicata*. Plaintiff rehashes several argu-

ments in this section that are responded to elsewhere.[7] Plaintiff also argues that the defense of *res judicata* should "have failed" because (1) the district court did not hold a hearing; (2) "the defendants in *Langdon v. Swain* filed no answer" and the District Court improperly raised the defense of *res judicata;* (3) the district court did not cite the "N[orth] C[arolina] law of *res judicata;*" (4) the entire record of the case upon which *res judicata* was based was not submitted to the district court; (5) the judgment upon which *res judicata* was based was not a valid judgment; and, (6) the privity element of *res judicata* was not satisfied.[8] Defendants will respond to these contentions in turn.

(1) The District Court dismissed Plaintiff's Complaints in both *Langdon v. Tippett* (1:01CV107) and *Langdon v. Swain* (1:01CV139) *sua sponte*, without any motion to dismiss in front of the court. A *sua sponte* dismissal, without a formal hearing, is appropriate when the court finds the Complaint to be frivolous. *Fitzgerald*, 221 F.3d at 363.

(2) A motion for extension of time filed by the Defendants in *Langdon v. Swain* was granted, thus extending

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[7]Plaintiff's arguments (b) and (c) on page 23 of his Petition correspond to sections III and I of this Response, respectively.

[8]These 6 arguments are taken from Plaintiff's arguments (a), (d) and (e), (f), (g), (i) - (k), and (h), respectively. (Pet. pp. 22 - 28)

their time to answer until August 17, 2001. However, the Defendants did not file an answer in that case because the District Court, *sua sponte*, dismissed the Complaint on August 6, 2001. The court also consolidated *Langdon v. Swain* with *Langdon v. Tippett*. An answer had been filed in the latter case, in which the doctrine of *res judicata* was raised as an affirmative defense. Thus, the District Court did not raise the defense of *res judicata* on its own motion, as Plaintiff states. (Pet. p. 23)

(3) The District Court in its order dismissing Plaintiff's Complaints discussed the law of *res judicata*, but did not cite specifically to North Carolina case law. *See Artis v. Norfolk & Western Ry.*, 204 F.3d 141, 147 (4th Cir. 2000) (federal court must "follow state preclusion law to determine the *res judicata* effect of a state court judgment"). However, the cases cited by the District Court espouse the same principles that North Carolina courts follow when applying *res judicata*: that a final judgment on the merits in a prior case bars a later suit "involving the same claim between the same parties or those in privity with them," as well as "relitigation of all matters that were or should have been adjudicated in the prior action." *Bockweg v. Anderson*, 333 N.C. 486, 491-92, 428 S.E.2d 157, 161 (1993). Further, the Fourth Circuit did base its decision regarding *res judicata* on North Carolina caselaw.

(4) Defendants raised the defense of *res judicata* in their Answer in *Langdon v. Tippett* (1:01CV107) with a

reference to *Langdon v. NCDOT*, Polk County (NC), 98 CVS 139, and its subsequent appellate history,[9] but did not attach to their Answer any of the documents filed in that previous case. However, Plaintiff's Complaint and attachments filed in *Langdon v. Swain* showed on their face that *res judicata* was applicable.

Paragraph 25 of the Complaint states that Plaintiff filed a complaint against NCDOT in Polk County, NC, given case number 98 CVS 139, and also filed a second suit with the North Carolina Industrial Commission (Pet. App. p. 81); paragraphs 26 through 28 reference a release signed by Plaintiff that terminated the Industrial Commission case and that was attached to Plaintiff's instant Complaint as Exhibit 10 (Pet. pp. 81 - 82). Plaintiff did not include the release in his Appendix; thus, Defendants have included it in their Appendix herein. The release clearly states that case 98 CVS 139, *Langdon v. NCDOT*, was an "inverse condemnation claim." (Res. App. p. 1a) Paragraph 47 of the Complaint states that NCDOT won a motion for summary judgment in case 98 CVS 139. (Pet. App. p. 91)

Thus, Plaintiff, through his Complaints and Exhibits, admitted that Plaintiff had filed an inverse condemnation suit against NCDOT in 1998, and that NCDOT won on

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[9]*Langdon v. NCDOT*, 138 N.C. App. 553, 536 S.E.2d 366, *cert. denied*, 352 N.C. 675, 545 S.E.2d 425 (2000).

summary judgment. *Langdon v. Tippett* (1:01CV107) questions the constitutionality of several condemnation and related statutes, while *Langdon v. Swain* (1:01CV139) seeks "damages for the taking of [Plaintiff's] real property." (Pet. App. 99) The District Court held that the claims presented in the instant Complaints (*Langdon v. Tippett* and *Langdon v. Swain*) could have been brought in the earlier action, and were thus barred by the doctrine of *res judicata*.

(5) Plaintiff baldly asserts that the prior judgment on which *res judicata* was based, *Langdon v. NCDOT*, 98 CVS 139, was not a valid judgment. Plaintiff does not explain in his Petition why said judgment was not valid, but merely alludes to previous filings he has made where he allegedly explained why the prior judgment is not valid. Plaintiff then asserts that Defendants never denied his prior assertions that the judgment was not valid. As Plaintiff does not cite the prior filings to which he alludes, Defendants cannot respond to this assertion. Defendants deny that they have ever admitted that the judgment in *Langdon v. NCDOT*, 98 CVS 139, is not a valid judgment.

(6) Finally, Plaintiff asserts *res judicata* does not apply herein, because the identity of the parties or privity of the parties element was not satisfied. The defendant in *Langdon v. NCDOT*, 93 CVS 139, was solely NCDOT. The Defendants in the instant cases are NCDOT and its Secretary

of Transportation; the North Carolina Department of Justice and its Attorney General; the state of North Carolina; and three current or former NCDOT employees. Plaintiff argues only that the employee-defendants (Swain, Martin, and Murdock) should not be held to be in privity with the State of North Carolina. (Pet. pp. 26 - 27) Defendants assume Plaintiff meant to argue that the employee-defendants should not be held to be in privity with NCDOT, as NCDOT was the defendant named in the case at issue, 98 CVS 139.

It is clear that the Defendants in *Langdon v. Tippett*, which consist of two agencies, the State of North Carolina, and two agency heads presumably sued in their official capacity, are in privity with the agency sued in *Langdon v. NCDOT*. *See Gregory v. Chehi*, 843 F.2d 111, 120 (3rd Cir. 1988). However, Plaintiff asserted in his Complaint in *Langdon v. Swain* that he was suing the three current or former NCDOT employees named therein in their individual (or personal) capacities. (Pet. App. p. 55) Though it appears North Carolina courts have never directly addressed the issue, federal courts hold that employees sued in their individual capacities are not generally considered to be in privity with the government for purposes of claims brought under 42 U.S.C. § 1983.[10] *See*

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[10]No federal cases specifically discuss the situation presented herein - a plaintiff making a takings claim under 42 U.S.C. § 1983 - and how that might affect the analysis.

Gray v. Lacke, 885 F.2d 399, 405-06 (7th Cir. 1989), *cert. denied*, 494 U.S. 1029, 110 S. Ct. 1476, 108 L. Ed. 2d 613 (1990).

Thus, it may not have been appropriate for the lower courts to dismiss Plaintiff's Complaint in *Langdon v. Swain* on the grounds of *res judicata*. However, there are alternative bases for dismissing said Complaint: Plaintiff has failed to state a claim upon which relief can be granted, and Defendants Swain, Martin and Murdock are entitled to qualified immunity. *See Harbert Int'l*, 157 F.3d 1271.

Plaintiff's Complaint alleges only that the three Defendants knew about the landslide or landslides that had occurred on his property; did nothing about the alleged damage to his property; "blamed" him for the landslide or landslides; and concealed information from him regarding NCDOT design practices. (Pet. App. pp. 77, 78, 80, 87) Plaintiff has not alleged any conduct on the part of any of the named Defendants that actually caused the landslide or landslides or otherwise resulted in a taking of his property, the only alleged violation of his rights for which he seeks remedy. (Pet. App. p. 99)

Plaintiff has thus failed to state a claim by failing to establish that the conduct of Defendants deprived him of his constitutional right to be free from a taking without just compensation. *See American Mfrs. Mut. Ins. Co. v.*

Sullivan, 526 U.S. 40, 49 - 50 (1999). Further, Defendants are entitled to qualified immunity, as the actions they are alleged to have taken "are not clearly established to be beyond the boundaries of [their] discretionary authority[, . . . and no] reasonable official in the defendant[s'] position would have understood" that the alleged conduct went beyond the limits of his statutory authority. *Better Gov't Bureau v. McGraw (In re Allen)*, 106 F.3d 582, 593 (4th Cir. 1997), *cert. denied*, 522 U.S. 1047, 118 S. Ct. 689, 139 L. Ed. 2d 635 (1998).

Thus, the decision of the lower courts to dismiss Plaintiff's Complaints as frivolous should be upheld. *See Hall v. Quillen*, 631 F.2d 1154, 1155 (4th Cir. 1980) (appellate court may affirm on grounds other than those stated by district court), *cert. denied*, 454 U.S. 1141, 102 S. Ct. 999, 71 L. Ed. 2d 293 (1982).

In short, Plaintiff has failed to present a compelling reason why this Court should grant his Petition. *See* Rule 10.

VI. The District Court did not abuse its discretion by denying Plaintiff's Motion to Recuse

Finally, Plaintiff appears to argue that it was error for the district judge to deny his motion to recuse.[11] Plaintiff asserts the district judge should have recused himself because (1) he was formerly the Attorney General for the State of North Carolina, and it would be "natural" for him "to identify with the interests of the State;" (2) in his position as Attorney General, he worked with the current Attorney General, Roy Cooper, and is a member of the same political party as Cooper; (3) the current Secretary of Transportation "possibl[y]" contributed "heavily" to Cooper's campaign for Attorney General; (4) Judge Thornburg "may have" defended the named Defendants in *Langdon v. Swain* (1:01CV107); and, (5) an attorney for NCDOT, not party to or counsel in this lawsuit, served under Judge Thornburg when he was Attorney General. (Pet. pp. 28-30)

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[11]Plaintiff does not specifically argue for reversal of the dismissal of his Complaints on this ground, but Defendants have assumed that is the outcome Plaintiff seeks. Further, Plaintiff mentions in this section of the Petition a motion to transfer venue and alludes to a motion he made to enjoin "the noteholders and trustees." (Pet. pp. 28-30) As Plaintiff does not assert any error in the denial of these motions that justifies reversal of the dismissal of his Complaints, and as Plaintiff did not raise these issues as error in the Fourth Circuit, Defendants will not address those motions herein.

"[T]o constitute grounds for disqualification, the probability that a judge will decide a case on a basis other than the merits must be more than 'trivial.'" *United States v. DeTemple*, 162 F.3d 279, 287 (4th Cir. 1998) (citation omitted), *cert. denied*, 526 U.S. 1137, 119 S. Ct. 1793, 143 L. Ed. 2d 1020 (1999). Plaintiff's allegations, many of them couched in terms of things Judge Thornburg "may have" done, or things that other people "possibl[y]" did, simply would not lead a "reasonable, well-informed observer" to question Judge Thornburg's impartiality, *id.* at 286, and do not rise above the level of a "trivial" risk of bias, *id.* at 287.

Defendants ask this Court to take judicial notice that Judge Thornburg was commissioned to the federal bench in March 1995 and last served as Attorney General in 1992;[12] thus, he could not have been involved as Attorney General in any of the litigation brought by Plaintiff relating this case, which centers around events beginning in June of 1995.

Further, Plaintiff has submitted nothing beyond bald, unsubstantiated assertions to indicate that Judge Thornburg is, by necessity because of his former employment, biased in favor of the State of North Carolina. If Plaintiff's formulation of 28 U.S.C. § 455 were correct – that a

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[12]This information is available from the website of the Federal Judicial Center, at http://www.air.fjc.gov/history/judges_frm.html.

former Attorney General is presumed to be biased, such that "his impartiality might reasonably be questioned," *id.* -- Judge Thornburg, and any other former Attorney General appointed to the federal bench, would be forced to recuse himself from every case in which the State he represented is a party, or in which a statute from that state is questioned.

A "district court judge's refusal to recuse himself" pursuant to 28 U.S.C. § 455 is reviewed "for abuse of discretion." *DeTemple*, 162 F.3d at 283. Plaintiff has not shown that Judge Thornburg abused his discretion by failing to recuse himself. Further, the Fourth Circuit applied the proper "rule of law" to review of the Motion to Recuse and found no abuse of discretion, and Plaintiff has presented no compelling reason for review of the treatment of that motion. This Court should thus refrain from granting Plaintiff's Petition on this ground. *See* Rule 10.

CONCLUSION

Plaintiff has not argued, and has made no showing, of any compelling reason , *see* Rule 10, which would justify review by this Court of claims found to be frivolous by both a District Court and the Fourth Circuit Court of Appeals. For the reasons stated above, this Court should not issue its writ of certiorari to review the decision of the Fourth Circuit Court of Appeals affirming the orders of the trial court.

Respectfully submitted,

ROY COOPER
North Carolina Attorney General

Robert O. Crawford, III*
Special Deputy Attorney General

Lisa C. Glover
Assistant Attorney General

September 3, 2002

**Counsel of Record*

APPENDIX

CONTAINING:

Exhibit 10 to Plaintiff's Complaint in *Langdon v. Swain*, 1:01CV139 (release signed by plaintiff in previous case)

NORTH CAROLINA INDUSTRIAL COMMISSION
RALEIGH, NORTH CAROLINA

RELEASE OF TORT CLAIMS UNDER GENERAL STATUTES 143-291 *et seq*

I.C. File No. TA-15328

KNOW BY ALL MEN BY THESE PRESENTS, That I, We, for the sole consideration of TWO THOUSAND DOLLARS ($2,000.00) to be paid by the NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, the payment whereof being made under the provision of General Statutes 143-291 et seq., I, We, have released, and discharged and by these presents do for myself, ourselves, my, our heirs, executors, administrators and assigns release and forever discharge the NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, its officers and employees, including J. J. Swain, Jr., Dennis Allen, F. D. Martin, and Russell Glass, its servants and agents, of and from any and all claims, demands, damages, actions, causes of action or whatever kind or nature, excepting only the purported inverse condemnation claim set forth in Christopher Langdon v. North Carolina Department of Transportation, Polk County Superior Court File No. 98-CVS-139, on, account of a landslide which began on or about June of 1995 on the property of Christopher Langdon located on State Road 1116, Hogback Mountain Road in Polk County, North Carolina, resulting in alleged dam-

ages to the aforementioned real property of Christopher Langdon and alleged damage to the reputation of Christopher Langdon.

I, We, understand that this release is made as compromise to avoid expense and to terminate all controversy and/or claims for injuries or damages of whatever nature, known or unknown, including future developments thereof, in any way growing out of or connected with said incident or aforementioned landslide, excepting only the aforementioned purported inverse condemnation claim set forth in Christopher Langdon v. North Carolina Department of Transportation, Polk County Superior Court File No. 98-CVS-139. We, agree that the sum paid is solely by way of compromise of disputed claims, and it is therefore specifically agreed that this release shall be a complete bar to all claims or suits for injuries or damages of whatsoever nature resulting from said incident, excepting only the purported inverse condemnation claim set forth in Christopher Langdon v. North Carolina Department of Transportation, Polk County Superior Court File No. 98-CVS-139.

IN WITNESS THEREOF, I, We, have hereunder set my, our, hand(s), this the 1st day January, 1999.

/s/ Doug H. Best
Witness

3107 S. Memorial Dr.,
Greenville, NC 27834
Address

/s/ Christopher Langdon
CHRISTOPHER LANGDON
Claimant
307 West Church Street
Farmville, North Carolina
27828

APPROVED:

MICHAEL F. EASLEY
ATTORNEY GENERAL

By: /s/ Michael C. Warren
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